

**United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL**

Advice Memorandum

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DATE: June 26, 2008

TO : Joseph Norelli, Regional Director
Region 20

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: National Right to Work Legal Defense
and Education Fund
Case 20-CA-33673

This case was submitted for advice on whether the National Right to Work Legal Defense and Education Fund (the Foundation) violated Section 8(a)(1) by filing an attorney misconduct complaint against a union attorney pursuant to Section 102.177 of the Board's Rules and Regulations, in which it also requested the General Counsel to refer the attorney to the Department of Justice for criminal prosecution.

We conclude that the request for referral did not violate the Act, as it was reasonably based under the test set forth by the Board in BE & K Construction Co. on remand.¹

FACTS

Early Background

In a letter dated February 17, 1998, the Board, through its Executive Secretary, admonished union attorney David Rosenfeld for "continuously referring to the National Right to Work Legal Defense Foundation as the 'Right to Freeload Committee,' 'The National Right to Shirk Legal Defense Foundation' or variations thereon, and to the employees of this organization including [its] Attorney as 'Shirkers.'" Rosenfeld's remarks referenced by the Board were contained in certificates of service and other Board filings. The Board indicated it found such offensive epithets inappropriate and a manifest disrespect for the Board's processes as well as opposing counsel. Rosenfeld was admonished that "any future filings in any matter in which he addresses the [Foundation] or its counsel or any party in this or a similar inappropriate manner risk rejection pursuant to Section 102.114(a) of the Board's

¹ 351 NLRB No. 29 (September 29, 2007).

Rules and Regulations." The letter notes that Member Hurtgen would have referred the matter to the General Counsel pursuant to Section 102.177(e) of the Board's Rules and Regulations.

Recent Events

The current matter arose from a dispute between SEIU Local 790 (Local 790) and United Screeners Association, Local 1 (Local 1) over the representation of the airport security screeners employed by Covenant Aviation Security at the San Francisco International Airport. Steven Burke, a Covenant employee and the Vice President of Local 1, led an effort to deauthorize Local 790, including the filing of two UD petitions. Burke signed both petitions, and noted Local 1 as the "labor organization" filing the petition.

The UD petitions led to extensive litigation. The name of Glenn Taubman, an attorney employed with the Right to Work Legal Defense and Education Foundation (the Foundation), appeared on various documents submitted to the Board and the Regional office in connection with that litigation. For instance, Taubman was cc'd on a letter from Local 1 to the Regional Director in response to an order to show cause. On the cover sheet for the facsimile of that letter, the Local 1 attorney stated "if you should have any questions please call me at the number listed above. You may also call Mr. Glenn Taubman" That same attorney later sent a letter to Covenant's attorney stating, "Please address any correspondence and or legal proceedings to Mr. Taubman Esq." David Rosenfeld, an attorney representing Local 790, was served with all these documents.

On June 13, 2007, Local 790, by its attorney David Rosenfeld, filed a charge in Case 20-CB-12840 against Local 1 alleging that Local 1 unlawfully attempted to force Covenant to recognize it when Local 790 was the exclusive representative of the Covenant employees. Rosenfeld listed the "National Right to Shirk Legal Defense Fund and Committee" as the charged party "Union Representative to contact" and the Foundation's phone number and address in corresponding boxes on the charge form. This charge was dismissed by the Region in a short-form dismissal letter on June 26, and the dismissal was sustained on appeal.

On July 11, 2007, the Foundation sent a letter to NLRB Chairman Robert Battista and General Counsel Ronald Meisburg objecting to Rosenfeld's use of the pejorative form of the Foundation's name (Right to Shirk) on the CB charge, and his designation of the Foundation as the "Union Representative to contact." The Foundation requested that

the Board refer Rosenfeld's conduct to the Department of Justice for possible prosecution under the False Statements Act and open its own disciplinary proceedings under Sections 102.114(a) and 102.177 of the Board's Rules and Regulations. The Foundation sent a copy of this letter to the Department of Justice.

On February 8, 2008, Associate General Counsel Richard Siegel responded to the Foundation's complaint. This letter referenced two California Bar Rules that the Foundation alleged Rosenfeld had violated. Siegel concluded that these two rules had not been violated since, under California law, "statements of rhetorical hyperbole" were not sanctionable nor was language used in a "loose, figurative sense." Siegel wrote: "Mr. Rosenfeld's inclusion of inaccurate, mocking or pejorative statements in the charge form did not mislead the Agency in a material way or impede our investigation of the Charged Party's defense of the charge." Siegel concluded the evidence was insufficient to warrant further proceedings under the Board's rules and regulations. No further response has been forthcoming from the Department of Justice.

The Foundation asserts that it filed the complaint with the Board and requested the criminal referral "to challenge Rosenfeld's willful false statements to the Board on the Charge Form, being well aware of Rosenfeld's history of misconduct with the Board, and believing that someone needed to challenge him on his untruthfulness as an attorney filing charges with the Board."

In light of the Board's earlier admonition to Rosenfeld by the Board, the Region has determined that the Foundation had a reasonable basis for complaining about Rosenfeld referring to the Foundation as the "National Right to Shirk Legal Defense Fund and Committee." Accordingly, the issue submitted for advice is whether the request for a criminal referral to the Department of Justice had a reasonable basis in fact or law.

ACTION

We conclude that the Foundation's request that the Board refer attorney Rosenfeld to the Department of Justice did not violate the Act, as it was reasonably based under the test set forth by the Board in BE & K Construction Co. on remand.² Therefore, the Region should dismiss the charge, absent withdrawal.

² 351 NLRB No. 29 (September 29, 2007).

In BE & K, the Supreme Court reaffirmed its holding in Bill Johnson's³ that the Board can find the filing and maintenance of a baseless, retaliatory lawsuit to be an unfair labor practice.⁴ In its decision on remand in BE & K, the Board explicitly adopted the standard for determining whether a lawsuit is reasonably based set forth by the Supreme Court in the antitrust context. That is, "a lawsuit lacks a reasonable basis, or is 'objectively baseless,' if 'no reasonable litigant could realistically expect success on the merits.'"⁵

We conclude that the Foundation had a reasonable basis for requesting referral of its complaint against Rosenfeld to the Department of Justice for criminal prosecution. The basis for the Foundation's request is that Rosenfeld's designation of the Foundation as the "Union Representative to contact" on the charge form in Case 20-CB-12840 was "willfully false." Although the Associate General Counsel concluded that the evidence was insufficient to warrant further proceedings under the Board's rules and regulations, that outcome does not foreclose that any "reasonable litigant could realistically expect success on the merits."

The Foundation had a basis for believing that Rosenfeld's designation of its organization as a union was willfully false. The Foundation exists for the purpose of "combating compulsory unionism," and primarily represents individual employees in the furtherance of that aim. There should be no question that Rosenfeld, as an experienced union lawyer, knows that purpose and that the Foundation does not represent unions. In fact, Rosenfeld's designation of the Foundation as "The Right to Shirk Committee" demonstrates his view of the Foundation as an anti-union organization.

Although Taubman's association with Burke and Local 1's effort to deauthorize Local 790 may have been confusing, with his experience it should not have been so confusing to Rosenfeld as to lead him to believe that

³ Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731 (1983).

⁴ 536 U.S. 516, at 531-532 (2002). For purposes of this analysis, we assume here, without deciding, that Rosenfeld's conduct was protected by Section 7 of the Act.

⁵ 351 NLRB No. 29, slip op. at 7 (quoting Professional Real Estate Investors v. Columbia Pictures Industries, Inc., 508 U.S. 49, 60 (1993)).

Taubman and/or the Foundation were representing Local 1. There is no indication that Taubman entered a general appearance on behalf of Local 1 and that fact, together with Rosenfeld's experience, should have clarified any confusion caused by Taubman's association with the matter. In fact, the Foundation asserts, and the majority of documents in the deauthorization litigation suggest, that Taubman was representing Burke as the individual employee leading the deauthorization effort among Covenant's employees.

Therefore, since the Foundation had reason to believe that Rosenfeld would have known that Taubman was not representing Local 1, it had a reasonable basis for claiming that Rosenfeld's designation of the Foundation as a union representative was willfully false.

Accordingly, the Region should dismiss the charge, absent withdrawal.

B.J.K.